

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition for Declaratory Ruling That, Pursuant to
the Carve-Out Provisions of 47 U.S.C. § 251(g),
Interstate Originating Switched Access Charges,
Not Reciprocal Compensation Charges, Apply to
ISP-Bound Calls That Are Terminated via
VNXX-type Foreign Exchange Arrangements.

WC Docket No. 09-8

REPLY COMMENTS OF BLUE CASA COMMUNICATIONS, INC.

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Blue Casa Communications, Inc. (“Blue Casa”) submits this reply to comments filed in opposition to Blue Casa’s petition for a declaratory ruling that, pursuant to the carve-out provisions of 47 U.S.C. § 251(g), originating interstate switched access charges, not reciprocal compensation charges, apply to calls bound for Internet service providers (“ISPs”) that are delivered via “virtual NXX” (“VNXX”) -type foreign exchange arrangements.

I. THE SUBJECT OF BLUE CASA’S PETITION IS A MATTER OF SIGNIFICANT ON-GOING CONTROVERSY AND SHOULD BE RESOLVED BY THE COMMISSION

It is abundantly clear that Blue Casa’s petition is neither moot nor untimely. The comments filed in response to Blue Casa’s petition demonstrate, if nothing else, that there is long-standing, wide-ranging, and on-going controversy on the subject matter of the petition.¹

¹ Contrary to Verizon’s assertion that Blue Casa, itself, is not involved in any existing controversy over this issue due to its voluntary settlement of litigation with Pac-West Telecomm, Inc. (“Pac-West”) (*see* Comments of Verizon, Mar. 12, 2009, at p. 3), Blue Casa’s interests will be directly and substantially affected by a ruling on this matter because its intercarrier compensation agreement with Pac-West preserves, on a prospective basis, Blue Casa’s right to assess access charges for ISP-bound VNXX traffic delivered to Pac-West if Blue Casa’s petition

Some commenters support Blue Casa's petition outright. Others, while agreeing with Blue Casa in principle, suggest that ISP-bound traffic that is routed over such arrangements should be subject to *intrastate* access charges rather than *interstate* access charges as asserted by Blue Casa. Opponents of the petition contend that VNXX service not does not fit within the range of services to which pre-1996 Act access charges apply or that other 251(g) carve-out requirements are not met. But, they do not agree on what intercarrier compensation regime does apply to such arrangements. Some assert that the Commission has already decided that ISP-bound VNXX traffic is subject to the reciprocal compensation regime adopted by the *ISP Remand Order*.² Still others argue that while ISP-bound VNXX traffic is subject to reciprocal compensation under 47 U.S.C. § 251(b)(5), it is not capped at the \$0.0007 level established by the *ISP Remand Order* because the regime adopted by that order does not apply to calls between "CLECs" and does not apply to VNXX traffic, in any event.³ The comments show that state commissions addressing this topic are all over the board, as well.

Contrary to the comments of Core Communications, Inc. and others, the issue raised by Blue Casa is still unresolved despite ten years of reciprocal compensation litigation. The truth is that substantial, intractable controversy still obviously exists at this point and there is a need to the Commission to step in and put the matter to rest.

is granted. Further, granting Blue Casa's petition will clarify Blue Casa's right to bill and collect access charges from other interexchange carriers that complete ISP-bound VNXX calls.

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* (2001) 16 FCC Rcd 9151 ("*ISP Remand Order*").

³ Significantly from Blue Casa's perspective, the California Public Utilities Commission agrees with this view, as is shown by the attachments to Pac-West's comments.

II. THE ASSESSMENT OF ACCESS CHARGES FOR THE ORIGINATION OF ISP-BOUND VNXX TRAFFIC IS FULLY CONSISTENT WITH THE PURPOSE AND LANGUAGE OF THE 47 U.S.C. § 251(g) CARVE-OUT PROVISIONS

A. Providers of Jurisdictionally-Interstate VNXX Service to ISPs Use Originating Local Exchange Carrier Facilities in the Same Way as Other Interexchange Service Providers and, Therefore, Are Subject to Access Charges Under Pre-1996 Act Access Charge Policies

Opponents of Blue Casa's petition decry the suggestion that VNXX service is subject to the § 251(g) carve out, arguing that it is an entirely new type of service that came into existence only after the 1996 Act's adoption and, therefore, cannot possibly be covered by the pre-1996 Act access charge policies that are preserved by that section. In support of their position, they point to technical differences between the methods used to complete interexchange services prior to the adoption of the 1996 Act and the technology and routing used to complete VNXX calls. They also contend that the call origination services provided by local exchange carriers to enable the completion of ISP-bound VNXX calls do not fit into the traditional bundled feature group offerings typically described in access tariffs.

However, by focusing on technical characteristics of VNXX service and tariffed descriptions of access service offerings, these commenters miss the boat. The Commission's pre-1996 Act access charge policies are not simply an *ad hoc* collection of rules or tariff provisions adopted or approved over time. Rather, they are components of a comprehensive plan for the recovery of costs associated with the origination and termination of interstate telecommunications services, which includes, as a primary goal, the elimination of unreasonable discrimination and undue preferences among rates for interstate service.⁴ With limited exceptions, the Commission's overarching access charge policy has always been that all who use

⁴ See, e.g., *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd 7441 (1987), ¶ 1.

the local exchange network in the same way to complete interstate calls, including end users as well as interexchange carriers, should pay a fair and reasonable portion of the costs arising out of such use.⁵

Notably, the applicability of access charges has not been dictated by what particular services are called or how they are provided from an interexchange carrier's or user's perspective. Instead, under the Commission's policy, the applicability of access charges has depended, again with limited exceptions, solely on the manner in which local exchange facilities are used to originate or terminate traffic. Accordingly, access charges apply to nearly all interstate services that rely on local exchange carrier end office switching for the origination of calls, including foreign exchange service, which the Commission has likened to 800 toll-free service, as well as message toll service ("MTS"), *and equivalent services*.⁶ Moreover, consistent with the Commission's nondiscriminatory access charge policies, users of a local exchange carrier's access services pay the same rates for the same functionality. Thus, except with respect to services originating at one of the few remaining non-equal-access end offices that continue to exist, charges for end office switching, for example, are the same regardless of whether end office switching is provided pursuant to a FGA, FGB, FGC, FGD, or some other access arrangement. Indeed, contrary to the suggestion of some commentators, the nomenclature and technical differences in dialing and routing that distinguish feature groups from one another are simply irrelevant for this purpose.

For this reason, the pedantic nitpicking over Blue Casa's characterization of VNXX service as a form of foreign exchange service and the listing of alleged differences

⁵ See, e.g., *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305 (1987), ¶ 2.

⁶ See, e.g., *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd 7441 (1987), ¶ 1.

(which in fact are minor, at most) between the ordering processes, signaling, and routing of calls that apply to traditional interexchange services versus VNXX services provided by self-proclaimed “CLECs,” are strictly red herrings and should be ignored.

What should not be ignored is that a carrier who provides VNXX service to ISPs is providing jurisdictionally-interstate service that, except for subtle differences, is both indistinguishable from the *functionality* of toll-free 800-type service or foreign exchange service and indistinguishable from the manner in which those services use the originating local exchange carrier’s network. Therefore, granting Blue Casa’s petition is compelled by the Commission’s underlying goal of its pre-1996 Act access charge policy to eliminate unreasonable discrimination and undue preferences among rates for interstate service and, consequently, is fully consistent with Congress’ purpose in preserving the Commission’s pre-1996 Act access charge policies through the enactment of § 251(g).

B. The Provision of End Office Switching at the Open End of VNXX Arrangements Constitutes “Exchange Access” Within the Meaning of 47 U.S.C. § 251(g).

Various commenters argue that the § 251(g) carve-out cannot be applied to allow access charges to be assessed on VNXX calls because the relevant provisions of that section only preserve access charge policies relating to “exchange access” and the functionality provided by the originating local exchange carrier in completing VNXX calls does not meet the statutory definition of “exchange access.” They point out that “exchange access” is defined as “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll service” (47 U.S.C. § 153(16)), which, in turn, is defined as “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service” (47 U.S.C. § 153(48)). According to these commenters, VNXX service cannot be deemed “toll telephone

service” because neither the originating local exchange carrier nor the “CLEC” that terminates the service assesses a separate charge on its exchange service customer for the completion of such calls. Also, it is contended that ISP-bound calls are not calls between “stations.”

The Commission, however, has construed the definition of “toll telephone service” in a more expansive manner than that proffered by these commenters. For example, in concluding that the provision of xDSL access service to ISPs ordinarily constitutes “exchange access,” the Commission explained that the “separate charge” requirement is satisfied because the charges that the ISP pays for transporting interexchange communications beyond the ISP’s network are separate from the “exchange service charge that the ISP or end user pays to the [originating] LEC.”⁷ Blue Casa notes that the charge that an ISP pays to a VNXX service provider who enables traffic to be transported from the originating exchange to the ISP’s network is also *separate* from the exchange service charges that the originating end user pays. Thus, in the case of ISP-bound VNXX traffic, there are at least two different types of “separate charges” (aside from the charges paid by the originating end user) to support the conclusion that the originating local exchange carrier is providing exchange access for the origination of toll telephone service: the separate charges that the ISP pays the VNXX service provider to enable the transport of traffic from the originating exchange to the ISP’s network; and the separate charges that the ISP pays for transporting communications beyond its own network to the Internet.

Another way to reach this same conclusion is by analogy to 800 toll-free service. Although the originating end user pays no additional charge when an 800 call is made, it is axiomatic that the originating carrier is providing exchange access to the 800 service provider

⁷ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999), ¶ 36.

when the destination of the 800 call is in another exchange. The *separate* charge that makes the 800 service “telephone toll service” is paid by the 800 customer, who, for all intents and purposes, occupies the same position as a VNXX customer.

Moreover, far too much is being read into the “separate charge” language by these commenters, in any event . As the United States Court of Appeals for the Second Circuit recently explained in rejecting a “CLEC’s” challenge to the imposition of terminating access charges for interexchange calls that the CLEC allowed end users to make at no additional, *separate* charge:

The underlying statute (which we must remember was originally drafted in 1934) draws sharp distinctions between services known popularly as “local” and “long-distance.” *See, e.g.*, 47 U.S.C. § 153(47)-(48). It seems likely that the “separate charge” language in the statute was written to underscore that “tolls” applied exclusively to long-distance service and were charged separately. But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers. Thus, Global’s argument that since it imposes no separate fee, its traffic cannot be considered toll traffic, is beside the point.⁸

Therefore, the assertion that VNXX providers are entitled to avoid access charges because they only assess a single charge for their service irrespective of whether calls originate in the same rate center in which their customers are located or originate in distant exchanges must be rejected.

Likewise without foundation is the notion that ISP-bound VNXX traffic does not constitute calls between “stations.” As the Commission has stated, “[T]he term ‘station’ in section 3(48) refers to *any* device used by an end-user to receive and terminate

⁸ *Global NAPs, Inc. v. Verizon New England, et al.*, 454 F.3d 91, 98 (2nd Cir. 2006).

telecommunications.”⁹ Thus, an ISP’s modem or other customer premises equipment to which a VNXX service provider delivers traffic is clearly a “station” within the meaning of that section.

Accordingly, it must be concluded that the provision of local exchange origination services for ISP-bound VNXX calls does constitute “exchange access.”

C. Providers of VNXX Services Are Properly Classified as Interexchange Carriers, Not Local Exchange Carriers, for Purposes of Applying the Carve Out Provisions of 47 U.S.C. § 251(g)

Aside from quarreling with the notion that VNXX service providers are recipients of originating exchange access service, opponents to Blue Casa’s petition argue that the § 251(g) carve out does not apply because VNXX service providers are not interexchange carriers. This, Blue Casa submits, is nonsense. The service that is offered to ISPs by these carriers is the ability to receive calls from distant exchanges. By definition, it is interexchange service. The part that a VNXX service provider plays in the actual transport of such traffic beyond the originating local exchange may, in some cases be quite small, such as where the provider interconnects with the public switched network at a single point of interconnection in a LATA and terminates VNXX traffic to a modem bank located across the street, or its role in that regard could be significantly greater. In either case, though, the VNXX service provider, whether providing interexchange transmission directly or through contractual interconnection arrangements with originating local exchange carriers, is the carrier that holds itself out to ISP customers as providing a transmission pathway all the way from the originating exchange to the point where traffic is handed off to the ISP. The ISP is buying, and paying for, interexchange service from the VNXX provider, not the originating local exchange carrier or any intermediate carrier. Thus, the conclusion is inescapable that providers of VNXX service are interexchange carriers.

⁹ 15 FCC Rcd 385, *supra*, at ¶ 40 (italics in original).

III. THERE IS NO GOOD REASON WHY LOCAL EXCHANGE CARRIERS SHOULD HAVE ANY DIFFICULTY BILLING ORIGINATING ACCESS CHARGES FOR VNXX CALLS

There is no reasonable basis for the assertion that the relief sought by Blue Casa would be difficult or impossible to effectuate.

First, the access charge elements for the functionalities required to provide exchange access for VNXX service, e.g., end office switching, trunk ports, tandem switching, transport, etc., are already defined in Part 69 of the Commission's rules, 47 C.F.R. Part 69, and, presumably, in filed access tariffs. It should be a simple matter for any local exchange carrier to revise or clarify its tariff so that the appropriate elements can be assessed on VNXX service providers as well as users of feature group bundles.¹⁰

Second, although an originating local exchange carrier will not have sufficient information based on originating call records to be able to distinguish between VNXX calls and local calls, tariff provisions easily can be adopted to require VNXX service providers, as access customers, to report usage data (percent interstate usage/percent local usage, for example) in order to allow accurate billing based on the terminating points of ISP-bound calls. Such information will not require the establishment of complicated "geolocating" conventions because the termination points of telecommunications services are already defined in Part 68 of the Commission's Rules, 47 C.F.R. Part 68, and VNXX service providers will certainly know the precise points at which they hand off traffic to their ISP customers.

¹⁰ Blue Casa has no opinion on whether existing interconnection agreements should be modified to allow access charges to be assessed on ISP-bound VNXX traffic. Blue Casa expects that parties should look to the provisions of their own interconnection agreements to determine whether clarification of existing law on this subject would trigger a right to amend such agreements.

Finally, in any case where exchange access to a VNXX service provider is jointly provided, there is no reason why established joint billing arrangements and standard billing conventions cannot be used to bill the VNXX provider in the same manner as any other user of jointly-provided exchange access service.

CONCLUSION

Blue Casa and those supporting its petition have shown that ISP-bound VNXX traffic is subject to originating interstate access charges under pre-1996 Act policies and that, because of on-going controversy and disputes over this issue, there is a real need for the Commission to step in and put this matter to rest.

The failure of the Commission to grant the relief sought by Blue Casa's petition pending overall intercarrier compensation reform will unjustifiably continue the patent unfairness of forcing true CLECs and their customers (a large portion of Blue Casa's customers are low-income residential subscribers) to subsidize the competitive forays of VNXX service providers and their ISP customers. Not only does Blue Casa currently provide call origination service for ISP-bound calls, it also pays charges for transiting (transporting) ISP-bound VNXX calls, and, on top of that, Blue Casa pays call termination charges to the VNXX service provider at rates that are substantially higher than the rates that apply under the *ISP Remand Order*. Other CLECs in California, and perhaps other states, are in the same position. These circumstances are clearly unfair and are precisely the opposite of Congress' intent in enacting the § 251(g) carve out.

Respectfully submitted March 23, 2009.

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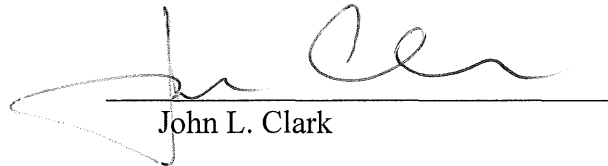
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